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In The
Supreme Court Of The United States

OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY SCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Petitioners

v.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that the issue of Plaintiff's entitlement to attorney's fees is controlled by the doctrine of law of the case?

INDEX

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 6

ARGUMENT 11

CONCLUSION 22

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Page

Cases:

American Public Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) 20

Ames v. Quimby, 106 U.S. 342 (1982) 11

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 19

Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) 15, 19

Bishop v. Committee on Professional Ethics, 686 F.2d 1278 (8th Cir. 1982) 15, 19

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 13

Buckton v. N.C.A.A., 436 F.Supp. 1258 (D. Mass. 1977) 16

Chaffin v. Taylor, 116 U.S. 567 (1886) 11

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 15

Clark v. Keith, 106 U.S. 464 (1882) 11

Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982) 15, 16, 18

Criterion Club v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979) 15

Davis v. City of Ennis, 520 F.Supp. 262 (N.D. Tex. 1981) 16

TABLE OF AUTHORITIES (continued)

Page

Davis v. Elmira Savings Bank, 161 U.S. 275 (1896) 21

Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982) 16

Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982) 20

Duke Power Co. v. Greenwood, 299 U.S. 259 (1936) 19

Hanrahan v. Hampton, 446 U.S. 754 (1980) 17, 18

Hastings v. Maine-Edwell Central School District, 676 F.2d 893 (2d Cir. 1982).....14

Howard v. Phelps, 443 F.Supp. 374 (E.D. La. 1978) 16

Hutto v. Finney, 437 U.S. 678 (1978) 19

Insurance Group Committee v. Denver & Rio Grande Western Railroad Co., 329 U.S. 607 (1947) 11

Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979) 15, 16

I.S.K.O.N. v. Andersen, 569 F.2d 1027 (8th Cir. 1978) 16

James v. Stockham Valve & Fitting Co., 559 F.2d 310 (5th Cir. 1977).....13

Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978).....16

Louisville Black Police, Etc. v. City of Louisville, 511 F.Supp. 825 (W.D. Ky. 1979) 13

TABLE OF AUTHORITIES (continued)

Page

Maher v. Gagne, 448 U.S. 122 (1980) 15, 16

Majors v. Housing Authority, 652 F.2d 454 (5th Cir. 1981) 20

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 21

New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982) 20

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 15

Oshiver v. Philadelphia Court of Common Pleas, 497 F.Supp. 416 (E.D. Pa. 1980) 16

Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1981) 14

Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) 16, 19

Roberts v. Cooper, 61 U.S. (20 How.) 467 (1857) 11

Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981) 16

Smith v. Thomas, 687 F.2d 113 (5th Cir. 1982) 16

Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) 16

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 20

Supervisors v. Kennicott, 94 U.S. 498 (1876) 11

TABLE OF AUTHORITIES (continued)

Page

Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980).....20

The Lady Pike, 96 U.S. 461 (1877).....11

United States v. Ford, 650 F.2d 1141 (9th Cir.), cert. denied, sub. nom., *Midwest Growers Cooperative v. United States*, 455 U.S. 942 (1982).....19

United States v. Munsingwear, 340 U.S. 36 (1950).....19, 20

United States v. New York Indians, 173 U.S. 464 (1899).....11

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982).....19

Williams v. Alioto, 625 F.2d 845 (9th Cir.), cert. denied, 450 U.S. 1012 (1981).....15, 16, 17, 19

Administrative Regulations:

34 C.F.R. §104.3(f).....4, 21

34 C.F.R. §104.4(b)(1) and (b)(4).....5, 21

Constitutional Provisions:

United States Constitution, Art. IV, Cl. 2.....21

Court Rules:

Internal Operating Procedures Manual, United States Court of Appeals for the Fifth Circuit.....2, 20

TABLE OF AUTHORITIES (continued)

Page

Rule 8(a) of the Federal Rules of Appellate Procedure 2, 20

Rule 27(a) of the Federal Rules of Appellate Procedure 3, 20

Rule 54(d) of the Federal Rules of Civil Procedure 4, 19

Rule 62(d) of the Federal Rules of Civil Procedure 7

Journals:

Note, "Civil Rights Attorney's Fees Awards in Moot Cases," 49 U.Chi. L. Rev. 819 (1982) 17, 18, 19, 20

Legislative History:

H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. (1976) 13, 15, 17

Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. reprinted in 5 U.S. Cong. & Adm. News p. 5909 (1976) 13, 15, 17

Statutes:

29 U.S.C. §794 ..... 2, 6, 9, 10, 15, 20, 21

29 U.S.C. §794(a) 7, 13, 15, 19

42 U.S.C. §1983 ..... 6, 15

42 U.S.C. §1988 ..... 7, 13, 15, 19

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v.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

Jane Doe, Plaintiff/Appellee below, respectfully requests that this Court deny the petition for writ of certiorari filed by the officers of the University Interscholastic League.

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 622 F.2d 118. The second opinion of the Court of Appeals is reported at 694 F.2d 1038. The first opinion of the District Court is reported at 459 F.Supp. 1190. These opinions are reproduced in the petition of the University Interscholastic League with the exception of the appendix to the District Court's initial opinion which was omitted.

ADDITIONAL RELEVANT STATUTES AND REGULATIONS

29 U.S.C. §749(a) states in pertinent part:

> "In any action or proceeding to enforce a charge or violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit states at p. 7:

> **Motion to Expedite Appeal.** Motions for this relief should be presented in the same manner as other motions. An appeal may be expedited only by the Court and for good cause shown. If an appeal is ordered expedited, the Clerk will fix a briefing schedule which will permit the appeal to be set for oral argument at an early date, unless an earlier hearing date is directed by a judge. The Clerk will usually have some idea of the approximate date of the hearing and will so advise counsel when the order is issued.

Rule 8(a) of the Federal Rules of Appellate Procedure states:

(a) **Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.** Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying or restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Rule 27(a) of the Federal Rules of Appellate Procedure states:

(a) **Content of Motions; Response; Reply.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other

parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice and the court may shorten or extend the time for responding to any motion.

Rule 54(d) of the Federal Rules of Civil Procedure states:

(d) **Costs.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

34 C.F.R. §104.3(f) states:

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a

recipient, but excluding the ultimate beneficiary of the assistance.

34 C.F.R. §104.4(b)(1) and (b)(4) state, in pertinent part:

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangements, on the basis of handicap:

> (i) Deny a qualified handicapped person the opportunity to participate in a benefit, aid, or service;
>
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing a significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program.

4. A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

STATEMENT OF THE CASE

Summary of Proceedings

Plaintiff filed this action on August 7, 1978, in Federal District Court for the Southern District of Texas, Galveston Division. Her complaint alleged violations of her son's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (hereinafter Section 504). Plaintiff alleged causes of action under Section 504 and 42 U.S.C. Section 1983.

The trial court conducted an evidentiary hearing on August 11, 1978 and on August 16, 1978, entered a preliminary injunction that granted Plaintiff all the relief she sought.

On August 24, 1978, the University Interscholastic League (hereafter "the U.I.L.") perfected an appeal to the Fifth Circuit.

On December 19, 1979, Plaintiff filed a motion with the trial court for an award of attorney's fees. The court decided to defer reaching this issue pending the outcome of the appeal.

On July 21, 1980, the Fifth Circuit vacated the preliminary injunction on mootness grounds, ruled that Plaintiff was entitled to a fee award as the prevailing party, and remanded to the trial court for a determination of the appropriate sum of fees.

In August 1980, the U.I.L. filed a petition with the Fifth Circuit for a rehearing en banc. The court denied the petition and issued its mandate on October 2, 1980.

On October 15, 1980, Plaintiff filed a supplemental motion for attorney's fees with the trial court. However, the U.I.L. filed an application for writ of certiorari with

this Court and the trial court decided to defer a decision on attorney's fees pending a final disposition.

On May 18, 1981, this Court denied the U.I.L.'s petition.

On June 10, 1981, Plaintiff filed her third motion for attorney's fees with the trial court. An evidentiary hearing was held in July 1981, and, in February 1982, the trial court ordered a fee award pursuant to 42 U.S.C. Section 1988 and 29 U.S.C. Section 794a.

On March 8, 1982, the U.I.L. perfected an appeal to the Fifth Circuit. Soon thereafter, the U.I.L. secured a stay as a matter of right pursuant to Rule 62(d) of the Federal Rules of Civil Procedure.

On January 6, 1983, the Fifth Circuit ruled that the U.I.L.'s appeal was barred by the doctrine of "law of the case."

Statement of Facts

Plaintiff brought this action on behalf of her son, John Doe. At the time this suit was filed, John Doe was seventeen years old and was about to begin his senior year in high school.

Defendant Bailey Marshall is the Director of the U.I.L. The U.I.L. is an organization composed solely of public schools that is affiliated with the Bureau of Public School Services of the University of Texas. The U.I.L. is the rule-making and policy-making body for all interscholastic competition among public schools in the State of Texas. It is empowered to enforce compliance with its rules by various devices, including the suspension of non-complying schools from post-season tournament competition.

The U.I.L. is funded by dues assessments from its member schools. Public school districts in Texas, including the Defendant Alvin School District, fund their athletic programs, in part, with federal grants.

John Doe resided with his parents in Friendswood, Texas and attended the public schools in Friendswood until March 1978. John Doe suffered from serious psychiatric problems which had been manifested in violent behavior directed toward his parents and in poor academic performance. After a series of particularly violent family episodes in late 1977 and early 1978, John Doe's psychologist recommended that he be removed from his parent's home. In March 1978, John Doe began living with his grandparents in Alvin, Texas. He also began attending Alvin High School. Subsequent to this move, John Doe's emotional status, his performance in school, and his relationship with his parents improved markedly, and it was agreed that he should remain with his grandparents and continue to attend Alvin High for the 1978-79 school year.

John Doe played varsity football when he attended the Friendswood public schools, and he wished to continue this activity at Alvin High School. Football was very important to John Doe, and his mother believed that it was the primary factor that motivated him to remain in school despite academic problems and an inability to successfully interact with his peers. Moreover, John Doe's psychologist had concluded that his participation in football was therapeutically significant in that "it allows him an outlet for some of his tension and aggressive feelings in a very structured and controlled manner."

The Superintendent of John Doe's new school district did not object to his participation in the varsity football program. However, he advised Plaintiff to first contact the U.I.L. in order to accommodate the U.I.L.'s residency rule. That rule virtually precludes students from engaging in interscholastic competition for one academic year where they

have transferred schools and their parents do not reside in their new school district. The purpose of the rule is to prevent tampering by coaches and to deter disenchanted athletes from "shopping" for new schools.

Plaintiff conferred with U.I.L. officials about John Doe's eligibility status in the spring of 1978. She was informed that John Doe would be barred from participating in interscholastic athletics at Alvin High School.

On June 27, 1978, Plaintiff filed a complaint with the Office of Civil Rights of the Department of Health, Education, and Welfare (hereafter OCR), alleging that the U.I.L. was prohibiting John Doe from participating in interscholastic sports in violation of Section 504 of the Rehabilitation Act. Football practice was scheduled to begin in mid-August, and when it became clear as of August 7 that OCR could not resolve this matter by the beginning of the football season, Plaintiff filed this lawsuit.

As a result of the trial court's preliminary injunction order, John Doe played varsity football during the fall of 1978 and graduated from high school in May 1979. The U.I.L. did not attempt an expedited appeal, and its appeal was argued and decided in 1980.

The Prior Decisions

In its preliminary injunction order of August 16, 1976 (hereafter, "the first trial decision"), the trial court ruled that the Alvin Independent School District (hereafter A.I.S.D.) was a recipient of federal funds; that John Doe was a "handicapped" individual within the meaning of Section 504; that, as a result of his handicap, he had a "legitimate and compelling" therapeutic need to attend A.I.S.D. and to be eligible for interscholastic competition; and that the U.I.L. could readily have accommodated John Doe's special needs without expense and without jeopardizing the objectives that its residency rule was designed

to address. For these reasons, the trial court held that Plaintiff would most likely prevail on her claim that the U.I.L. had violated Section 504, and it entered a preliminary injunction restraining the Defendants from interfering with John Doe's participation in interscholastic sports.

On the U.I.L's appeal from the preliminary injunction order (hereafter "the first appellate decision"), the Fifth Circuit ruled that because John Doe had graduated from high school, the case was moot. The court held that Plaintiff's pending attorney's fees motion did not salvage an otherwise moot case and did not entitle the U.I.L. to review of the merits. The court also ruled that because Plaintiff had secured all the relief she sought by virtue of the preliminary injunction order, she was a prevailing party and was entitled to an award of attorney's fees. The court vacated the preliminary injunction as moot and remanded the case to the trial court for a determination of appropriate attorney's fees.

Following the Supreme Court's denial of the U.I.L.'s certiorari petition (hereafter "the first certiorari petition"), the trial court conducted an evidentiary hearing on the appropriate sum of attorney's fees. In an order dated February 11, 1982 (hereafter "the second trial decision"), the trial court rejected the U.I.L.'s argument that it should ignore the mandate of the Fifth Circuit and require the parties to relitigate the merits. The trial court ordered an award of fees in the sum of $8,026.00.

On the U.I.L.'s appeal from the attorney's fees order (hereafter "the second appellate decision"), it reasserted the identical issues decided in "the first appellate decision" and raised in its "first certiorari petition;" namely, that the Plaintiff was not a prevailing party and that the U.I.L. was entitled to appellate review of the merits of "the first trial decision" by virtue of Plaintiff's claim for fees. The Fifth Circuit ruled that the U.I.L.'s arguments were barred by the doctrine of "law of the case."

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE ISSUE OF PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES IS CONTROLLED BY THE DOCTRINE OF LAW OF THE CASE.

This Court has consistently ruled that issues brought to its attention in a prior petition cannot be reexamined in a subsequent petition in the same suit. See, e.g., *Insurance Group Committee v. Denver & Rio Grande Western Railroad Co.*, 329 U.S. 607, 612 (1947); *United States v. New York Indians*, 173 U.S. 464, 472-73 (1899); *Chaffin v. Taylor*, 116 U.S. 567, 572 (1886); *Clark v. Keith*, 106 U.S. 464 (1882); *Ames v. Quimby*, 106 U.S. 342, 349 (1882); *The Lady Pike*, 96 U.S. 461, 462 (1877); *Supervisors v. Kennicott*, 94 U.S. 498, 499 (1876). The rationale goes to the very integrity of the judicial process.

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. . . . [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481 (1857).

The need for strict adherence to the "law of the case" doctrine is illustrated by the tortuous course of this litigation. Plaintiff secured all the relief she sought and, therefore, became entitled to an award of attorney's fees as a consequence of the first trial decision entered in August 1978. The U.I.L. filed an appeal and in July 1980, the Fifth Circuit vacated the preliminary injunction for mootness, ruled that Plaintiff was entitled to a fee award as the

prevailing party, and remanded to the trial court for a determination of the appropriate sum of fees. The U.I.L. argued to the Fifth Circuit that Plaintiff was not a prevailing party and that it was entitled to appellate review of the merits by virtue of Plaintiff's pending attorney's fees motion, but the panel rejected these arguments. The U.I.L. reasserted these arguments to the Fifth Circuit in a petition for rehearing en banc and the petition was denied in October 1980. The U.I.L. posed these arguments to this Court in its first application for writ of certiorari, and this Court denied review in June 1981. 451 U.S. 793 (1981).[1] The U.I.L. reasserted these arguments to the trial court on remand, and in the second trial decision, the court ruled that it would not violate "the clear mandate" of the Fifth Circuit by relitigating the merits. The U.I.L. posed these arguments in its second appeal to the Fifth Circuit and the court ruled that, having already decided these questions in the first appeal, the second appeal was controlled by the doctrine of law of the case. The U.I.L. has now returned to this Court with the sole purpose of relitigating the identical issue.

It is speculation as to whether the U.I.L.'s litigation strategy is predicated on changes in the composition of this Court in the interim between the first and second certiorari petitions; on the hope of a different, more receptive circuit court panel on its second appeal; or by a desire to delay payment of Plaintiff's attorney's fees award. It is not speculation, however, that if the U.I.L.'s second certiorari petition was to be granted, other litigants would have incentive to adopt a strategy of never-ending appeals. The result would be to aggravate the burden on the already over-crowded federal court dockets, to subject parties to greater litigation expenses, and to jeopardize the respect accorded to this Court's decisions and those of the lower

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[1]The "argument" section of the U.I.L.'s first petition for writ of certiorari is attached to this brief as an appendix.

federal courts. For all of these reasons, the Court of Appeals correctly ruled that this case should be controlled by the doctrine of law of the case.

II. THE U.I.L.'S PETITION IS IN CONFLICT WITH THE CONGRESSIONAL INTENT UNDERLYING THE ATTORNEY'S FEES AWARDS STATUTES.

Congress enacted attorney's fees statutes with the intent of encouraging private citizens to take the initiative in enforcing basic constitutional and statutory provisions. See Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. at p. 2, 3, 4, 5, 6, reprinted in 5 U.S. Code Cong. & Adm. News, pp. 5909-13 (1976) (hereafter "Sen. Rep."); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. at p. 1, 2, 3 (hereafter "H.R. Rep."). See also 42 U.S.C. §1988; 29 U.S.C. §794a. Congress recognized, however, that the intended impact of these statutes would be vitiated if losing defendants could successfully delay the payment of fees and thereby impose financial hardships on plaintiffs' attorneys. See Sen. Rep. supra, at p. 5, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912; H.R. Rep. supra, at p. 8. As the Fifth Circuit has noted in recognizing the appropriateness of interim fee awards:

> "There is a danger that litigants will be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such risk. . . . [T]he danger exists that defendants . . . may be tempted to seek victory through an economic war of attrition against the plaintiffs." *James v. Stockham Valves & Fitting Company*, 559 F.2d 310, 358-59 (5th Cir. 1977).

See *Bradley v. Richmond School Board*, 416 U.S. 696, 723 (1974); *Louisville Black Police Etc. v. City of Louisville*, 511 F. Supp. 825, 841-42 (W.D. Ky. 1979).

The public interest in assuring the timelessness of fee awards was noted in an analogous context to that at bar in *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981). In *Parker*, the trial court entered judgment for the plaintiff in a Title VII suit and the defendants appealed the amount of the fee award. The District of Columbia Circuit summarily affirmed the portion of the fee award that was uncontested and ordered an expedited appeal as to the remaining sum of money. The court set out its rationale as follows:

> "We are concerned that the public policy dictating that attorney's fees be awarded not be completely undercut by routine delays in payment of fees that are properly due and owing. Such delays have the potential to dampen attorney's enthusiasm to undertake discrimination cases. The court should not allow delay in cases such as this one to undermine the efficacy of Title VII Policy." 670 F.2d at 250.

See *Hastings v. Maine-Edwell Central School District*, 676 F.2d 893, 897-98 (2d Cir. 1982).

In the case at bar, the Fifth Circuit ordered an award of fees in its first decision to effectuate the congressional policy of encouraging citizens to weed out discrimination against handicapped persons. Almost five years have elapsed since Plaintiff achieved the primary relief sought and yet the fee award has not been implemented. The U.I.L. is responsible for a meaningful portion of this delay by virtue of a calculated strategy of repeatedly raising legal issues that are barred by the doctrine of law of the case. Its second certiorari petition is the culmination of these tactics. If the U.I.L.'s petition is granted, the precedent will serve as an added incentive for defendants to delay the implementation of fee awards, thereby deterring lawyers from representing civil rights complainants. The U.I.L.'s petition is, therefore, in conflict with the congressional objectives underlying the attorney's fees awards statutes.

III. THE COURT OF APPEALS' FIRST DECISION WAS CORRECTLY DECIDED AND IS CONSISTENT WITH THE PRECEDENT FROM OTHER CIRCUITS.

A. The Court Of Appeals Correctly Determined In Its Initial Opinion That Plaintiff Is The Prevailing Party For Purposes Of An Award Of Attorney's Fees.

A party who successfully sues a state agency pursuant to 42 U.S.C. Section 1983 and Section 504 "... should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Sen. Rep., supra, at p. 4, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912. See *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 416-17 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Criterion Club v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979). See also 42 U.S.C. §1988; 29 U.S.C. §794a.

A plaintiff who, as a result of litigation, has secured or become entitled to the primary relief sought is a "prevailing party" for purposes of an award of attorney's fees. See, e.g., *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 599-602 (1st Cir. 1982); *Bishop v. Committee on Professional Ethics*, 686 F.2d 1278, 1289-91 (8th Cir. 1982); *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir.), cert. denied, 450 U.S. 1012 (1981); *Bagby v. Beal*, 606 F.2d 411, 414-15 (3d Cir. 1979); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352 (5th Cir. 1979). The courts approach a "prevailing party" analysis by juxtaposing, on a case by case basis, the nature of the relief secured with the objectives of the suit. See *id.* The focus is on the relief received rather than on formal procedural labels. Sen. Rep. at p. 5, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912; H.R. Rep. at p. 7-8. See, e.g., *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980) (party entitled to fees after securing desired

relief through consent decree); *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981) and *I.S.K.O.N. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978) (parties entitled to fees after securing desired relief through defendants' voluntary cessation of the challenged conduct). See also *Maher v. Gagne*, supra, 448 U.S. at 130 (deference accorded to lower court's finding that plaintiff received the primary relief sought).

The courts have applied these principles to attorney's fees motions predicated on relief achieved through preliminary injunction orders. Where preliminary relief is granted based upon a careful review of the merits and the order has the effect of permanently securing the primary relief sought, the plaintiff is a prevailing party. See *Coalition for Basic Human Needs v. King*, supra, 691 F.2d at 599-602; *Williams v. Alioto*, supra, 625 F.2d at 847-48; *Iranian Students Ass'n v. Edwards*, supra, 604 F.2d at 353; *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Howard v. Phelps*, 443 F.Supp. 374 (E.D. La. 1978); *Buckton v. N.C.A.A.*, 436 F.Supp. 1258 (D. Mass. 1977). Where a court grants preliminary relief based on consideration of the merits, but the plaintiff's entitlement to relief over the long term is contingent on the outcome of a trial on the merits or an appeal, a fee motion is premature. See *Doe v. Busbee*, 684 F.2d 1375, 1378-83 (11th Cir. 1982); *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 870-71 (8th Cir. 1977). Where interim relief is entered solely to forestall injury until such time as the court can address the merits, the plaintiff has not secured the ultimate relief sought nor an entitlement to that relief and, therefore, a fee award is not warranted. See *Smith v. Thomas*, 687 F.2d 113 (5th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 346-53 (4th Cir. 1980); *Davis v. City of Ennis*, 520 F.Supp. 262, 265-66 (N.D. Tex. 1981) (3 judge court); *Oshiver v. Philadelphia Court of Common Pleas*, 497 F.Supp. 416 (E.D. Pa. 1980). In all of these cases, the result attained, rather than the form of relief, is the determining factor. Implicit in the

holdings is a recognition that, given Congress's desire to encourage lawyers to represent civil rights litigants, it would be contrary to the underlying purpose of the attorney's fees awards statutes to deny fees where a client receives full relief solely due to the means by which the relief was secured. Sen. Rep., supra, at p. 5-6, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912-13; H.R. Rep., supra, at p. 8. See Note, "Civil Rights Attorney's Fees Awards in Moot Cases," 49 U. Chi. L. Rev. 819, 823-39 (1982) (hereafter "Note, Awards in Moot Cases"). Moreover, if attorney's fees were unavailable where a plaintiff secured relief through a preliminary injunction, defense lawyers could successfully negate the attorney's fees statute by extending and delaying subsequent trial and appellate proceedings in the hope that a case would moot before a final decision on the merits or before exhaustion of the appellate process. See Note, "Awards in Moot Cases," supra, at p. 827.

The U.I.L. argues that this Court's decision in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), precludes an award of attorney's fees predicated on a preliminary injunction order in all circumstances. In *Hanrahan*, the trial court directed a verdict for the state defendants in a civil rights action. The Seventh Circuit reversed, remanded for a new trial, and awarded the plaintiffs' attorney's fees. This Court reversed the award of fees because the plaintiff had yet to prevail on any of their substantive claims. However, the Court emphasized that a final judgment is not a prerequisite to a fee award so long as the plaintiff secures some meaningful measure of the primary relief sought. 446 U.S. at 756-57.

The decision in *Hanrahan* was applied in an identical context to that at bar in *Williams v. Alioto*, supra, 625 F.2d 845. In *Williams*, the plaintiff secured a preliminary injunction against policies of the San Francisco Police Department. The City appealed but, prior to oral argument, it became apparent that the challenged policies would not be

reinstated even if the trial court's decision was reversed. The appellate court dismissed the case as moot, vacated the preliminary injunction, and remanded to the trial court. The trial court granted the plaintiff's motion for a fee award and the city again appealed. Relying on *Hanrahan*, the Ninth Circuit ruled that the preliminary injunction qualified the plaintiff as a "prevailing party" because the trial court had carefully considered the merits and because, as a consequence of the trial court's order, he had permanently secured the primary relief sought. See *Coalition for Basic Human Needs v. King*, supra, 691 F.2d at 599-602 (ordering a fee award predicated on preliminary relief in reliance on *Hanrahan*). See also Note, "Awards in Moot Cases," supra, at p. 824-39.

Plaintiff filed this action to vindicate her son's right to participate in interscholastic football free of discrimination based on handicap. At the time suit was filed, it was apparent to the parties that, given the time parameters, the preliminary injunction motion would dispose of the merits. The trial court addressed the merits and granted Plaintiff a preliminary injunction after an evidentiary hearing that developed all the relevant facts. As a result, John Doe participated in interscholastic athletics until he graduated from high school. In its first appellate decision, the Fifth Circuit ruled that Plaintiff had secured all of the relief sought. In light of this record, Plaintiff is a "prevailing party" under the logic of *Hanrahan* and all the relevant caselaw.

B. The Fifth Circuit, In Its First Decision, Properly Vacated The Preliminary Injunction As Moot And Remanded The Case To The Trial Court For A Determination Of Appropriate Attorney's Fees.

Well before the time of oral argument, John Doe completed his interscholastic athletic career and graduated

from high school. Pursuant to this Court's routine practice and in order to protect the rights of the Defendant U.I.L., the panel vacated the preliminary injunction and remanded to the district court for a determination of appropriate attorney's fees. See *United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950); *Duke Power Company v. Greenwood County,* 299 U.S. 259, 267-68 (1936).

The U.I.L. has repeatedly complained that the award of attorney's fees saves this case from mootness and entitles it to a final judgment on the merits. The U.I.L.'s argument is instructive to the extent that it relies on caselaw which illustrates that many preliminary injunction orders will not be subject to mootness and that a fee award will therefore not be in order until the final disposition at trial or on appeal. See *Planned Parenthood v. Citizens for Community Action,* supra, 558 F.2d at 870-71. However, to the extent that the U.I.L. advocates reincarnating otherwise deceased cases solely because of a motion for fees, its thesis is at odds with the caselaw and the relevant policy concerns. See *Bishop v. Committee on Professional Ethics,* supra, 686 F.2d at 1290-91; *United States v. Ford,* 650 F.2d 1141, 1143 (9th Cir. 1981), cert. denied, sub. nom., *Midwest Growers Cooperative v. United States,* 455 U.S. 942 (1982); *Williams v. Alioto,* supra, 625 F.2d 845; *Bagby v. Beal,* supra, 606 F.2d at 414-15; Note, "Awards in Moot Cases," supra, at p. 824-39. As attorney's fees under the relevant statutes are awarded as a part of costs, the U.I.L.'s theory would mean that once a party prevails in any way in district court and becomes entitled to costs under Rule 54(d) of the Federal Rules of Civil Procedure, the case could never become moot regardless the subsequent events and the loss of an actual controversy. See 42 U.S.C. Section 1988; 29 U.S.C. Section 794(a). See also *White v. New Hampshire Department of Employment Security,* 455 U.S. 445 (1982); *Hutto v. Finney,* 437 U.S. 678, 696-98 (1978). Such a result would impose a serious burden on the already overcrowded docket of this Court. It also runs directly counter to this Court's well-founded aversion to making advisory opinions and to directly addressing important

public policy matters where the facts warrant a more narrow disposition. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J. concurring).

The first appellate decision in this case was a limited one. The court held that where a case becomes moot on appeal from an order granting a preliminary injunction, the fact that the plaintiff is entitled to costs and attorney's fees will not, per se, render the matter justiciable. This holding is particularly appropriate where, as in the case at bar, the inevitability of mootness is readily foreseeable but the defendant chooses not to avail itself of the standard procedures for an expedited appeal. See Rules 5, 8 and 27 of the Federal Rules of Appellate Procedure; Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit at p. 7. See also *United States v. Munsingwear*, supra, 340 U.S. at 40. Reversal of the decision below would penalize Plaintiff and reward the U.I.L. for the U.I.L.'s failure to conduct this litigation expeditiously. See Note, "Awards in Moot Cases," supra, at p. 827-28.[2]

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[2]The U.I.L. argues that if it is allowed to reopen the merits of the first trial decision, it would demonstrate that Plaintiff's rights under §504 were not violated because he was treated no differently than non-handicapped students. In *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979), this Court noted that a refusal to modify a program to accommodate a handicapped person would be "discriminatory" where accommodations could be made without imposing undue financial and administrative burdens and where ". . . insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program." See, e.g., *Dopico v. Goldschmidt*, 687 F.2d 644, 649-53 (2d Cir. 1982); *New Mexico Ass'n for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 852-55 (10th Cir. 1982); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1277-78 (D.C. Cir. 1981); *Majors v. Housing Authority*, 652 F.2d 454, 455-57 (5th Cir. 1981); *Tatro v. State of Texas*, 625 F.2d 557, 564 (5th Cir. 1980). In the case at bar, the trial court found in its first ruling that John Doe was a qualified athlete, that he had "a genuine and compelling need to participate in interscholastic football" despite his

We conclude that the first decision of the Court of Appeals was routine and correct, and that it is not of sufficient importance to warrant review by this Court.[3]

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2 continued
handicap and that the U.I.L. could accommodate his needs without suffering any financial detriment or jeopardizing the objectives of its residency rule. Based on these findings, the trial court's finding of liability under §504 is unimpeachable.

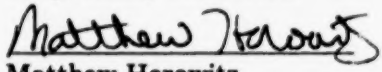
The U.I.L. also argues that §504 is inappropriate because the U.I.L. was not a recipient of federal funds. However, the trial court, in its initial decision, found that the Defendant Alvin School District received federal funds and the Fifth Circuit, in its second decision, noted that "... [t]he evidence also shows that the high school football program itself, participation in which was denied the handicapped boy, was in part directly supported by federal funds." The administrative regulations to §504 reflect that where a nonrecipient of federal funds supervises a federally funded program, the program must be operated in compliance with the statute. 34 C.F.R. §§104.3(f); 104.4(b)(1) and b(4). Separate from the scope of §504, the Supremacy Clause of the United States Constitution, Art. IV, cl. 2, empowers the federal courts to enjoin the acts of state agencies that "... frustrate the purpose of the national legislation...." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896). See *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967). Thus, regardless whether the U.I.L. receives federal funds, it must comply with §504 in supervising athletic programs that are recipients.

[3]The U.I.L. argues, in a footnote, that attorney's fees should not be assessed against any of the defendants in their individual capacities. Plaintiff's motion for attorney's fees sought recovery solely from Defendant Marshall in his official capacity as Director of the U.I.L. Though the trial court's second decision does not make this distinction on face, it is clear from the record taken as a whole that that was the trial court's intent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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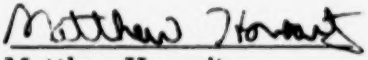
CERTIFICATE OF SERVICE

I certify that on the 16th day of May, 1983, I deposited three (3) copies of this brief in the United States Mail addressed to Ms. Laura Martin, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.



Matthew Horowitz

APPENDIX

REASON FOR GRANTING THE WRIT

From its inception, this case has raised serious jurisdictional issues under Section 504. One fundamental issue is whether the Congress, in enacting Section 504, intended to give private parties such as Jane Doe rights and remedies which they may seek to enforce privately in federal district court. If they have been given any rights and remedies, the question arises as to whether these rights are enforceable privately and to what extent they must be enforced solely or primarily by the Office of Civil Rights of the Department of Health and Human Services. Further, the court below did not decide whether the UIL constituted a "recipient" of federal financial assistance so as to trigger the regulatory provisions of Section 504 or whether, in fact, any discriminating treatment had been administered to John Doe in the UIL's consideration of his case. Certainly these issues should have been resolved before a proper determination could be made as to whether Jane Doe was a "prevailing party" for purposes of attorney's fees.

The court below's decision instead allows Jane Doe to recover attorney's fees solely because she received a preliminary injunction in the trial court which Petitioners argue was entered in error without even determination of the jurisdictional issues.

The question of whether such action should allow Jane Doe to be a "prevailing party" for attorney's fees, as held by the Court of Appeals, is of sufficient importance to merit resolution by this Court.

1. The Court of Appeals erroneously determined that the case was moot.

The Court of Appeals held that because Jane Doe had only sought injunctive relief for her son in the district

court and her son had subsequently finished his final term in school, a justiciable case or controversy no longer existed and a question of attorney's fees would not keep the case alive. Both the UIL and Jane Doe contended that the question of attorney's fees was an issue which could not be properly resolved until a determination on the merits was made by the court, which would, in turn, decide if Jane Doe was a "prevailing party" for purposes of 42 U.S.C. §1988.

On June 2, 1980, this Court entered a per curiam opinion, *Hanrahan v. Hampton*, 48 U.S.L.W. 3780, which addressed the "prevailing party" standard under 42 U.S.C. §1988. At issue was the plaintiffs' entitlement to attorney's fees for overturning several rulings by the district court at the appellate level, to wit: (1) the reversal of the district court's judgment directing verdicts against them; (2) the reversal of the district court's denial of a discovery motion; and (3) the direction to the district court to permit further discovery and hold a hearing on certain matters. This Court held that since plaintiffs had not prevailed on the merits of any of their claims, they were not entitled to attorney's fees. The basis of the opinion rested on the Court's interpretation of the legislative history of the Civil Rights Attorney's Fees Award Act of 1976:

> . . . it seems clearly to have been the intent of Congress to permit . . . an interlocutory award only to a party who established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. *Id.*, at 3781.

Under this standard, Jane Doe would not be entitled to attorney's fees. The Fourth Circuit recently issued a decision analogous to the present case. In *Smith v. University of North Carolina*, ____ F.2d ____ (4th Cir., Sept. 30, 1980), a claimant had succeeded in obtaining a preliminary injunction to prevent her discharge pending a decision on the merits, but the district court had ultimately found no merit in any of her discrimination claims. The court, citing

Hanrahan v. Hampton, supra, ruled that the plaintiff was not a prevailing party for purposes of an attorney's fee award.

In *Grubbs v. Butz,* 548 F.2d 973 (D.C. Cir. 1976), *cited with approval* in *Hanrahan v. Hampton, supra,* at 3781, n.4, the court held that a plaintiff in a Title VII lawsuit who succeeded on one issue in an interlocutory appeal (concerning the necessity of exhaustion of adminstrative remedies) was not thereby eligible for an award of attorney's fees because she hadn't yet demonstrated discrimination. The court found that:

> For all we know, the Defendants in this case may be entirely blameless. If attorney's fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. *Id.* at 976.

Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705 (6th Cir. 1979, *per curiam*), found that while the plaintiff was correct that his civil rights suit should not have to pay for attorney's fees on the basis of a plaintiff's purely procedural victory. In *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978), *cited with approval* in *Hanrahan v. Hampton, supra,* at 3781, n.4, the circuit court held that a party is "prevailing" for purposes of an attorney's fee award if he succeeds on any significant issue in litigation which achieves some benefit the parties sought in bringing suit. Since the plaintiffs in *Nadeau* prevailed on the issue of access to the prison library, they were entitled to attorney's fees.

In view of these holdings, Jane Doe is not entitled to award of attorney's fees at this time. The only relief the district court granted was injunctive — a procedural victory for Jane Doe at most. No finding has ever been made by the courts that John Doe, Jane Doe's son, was ever

discriminated against by Petitioners, that he was treated differently from any student falling under the provisions of the UIL's rules.

Furthermore, serious jurisdictional questions have still not been resolved by the courts below: whether Section 504 creates a private cause of action for private parties; whether the UIL is a recipient of federal funds which would trigger jurisdiction for the courts to decide the case; and whether 42 U.S.C. §1988 provides for an award of attorney's fees in a Section 504 case. Petitioners assert that were the courts to answer these questions, Petitioners would prevail in this lawsuit.[1] No significant issue raised by Jane Doe has been resolved in her favor. Therefore, at this time, an award of attorney's fees is improper under 42 U.S.C. §1983 and §1988. Clearly, the merits of this case must be decided before an award of attorney's fees can be made. Further, because attorney's fees will be contingent upon the determinations made on these issues, the court below was in error in its determination that the case is moot.

This critical question should be decided by this court to prevent Petitioners from being subjected to possible attorney's fees without ever having a determination made as to whether they are warranted.

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[1]This Court has presently granted certiorari in the case of *The University of Texas, et al., v. Walter Camenisch*, No. 80-317, to determine whether a private cause of action was created by Section 504. Petitioners have also argued that a showing of bad faith or obstreperous conduct must be made to justify attorney's fees under 42 U.S.C. §1983; and require that 42 U.S.C. §1988 does not provide for an award of attorney's fees under a Section 504 case. Petitioners would respectfully direct the Court's attention to Petitioners' arguments and cases cited in this petition and brief.

2. **If the case is moot, the proper cause of action would be for the Court of Appeals to set aside the decision below.**

Furthermore, the general rule governing dismissal for mootness by an appellate court is to accompany such order of dismissal with an order vacating the judgment below and to remand with directions to dismiss the case. *United States v. Munsingwear,* 304 U.S. 36 (1950); *Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972); *Board of Regents of the University of Texas v. New Left Education Project,* 414 U.S. 807 (1974); reversing *New Left Education Project v. Board of Regents,* 472 F.2d 218 (5th Cir. 1973); *University of Texas Systems v. Assaf,* 435 U.S. 992 (1978), reversing *Assaf v. University of Texas System,* 399 F.Supp. 1245 (D.C. Tex.) *Duke Power Company v. Greenwood County;* 299 U.S. 259 (1936); *Troy State University v. Dicket,* 402 F.2d 515 (5th Cir. 1968); *Lebus v. Seafarer's International Union,* 398 F.2d 218 (5th Cir. 1968).

The application of the general rule, vacation of the judgment upon dismissal of an appeal for mootness, is not dependent upon the reason that the case had become moot. The rule applies whether a case becomes moot through happenstance or because of the actions of one of the parties. *Board of Regents v. New Left Education Project, supra; Diffenderfer v. Central Baptist Church, supra; Hall v. Beals,* 396 U.S. 45 (1969).

The logic and philosophy behind the rule requiring the vacation of the judgment of the lower court is to prevent legal consequences, either by precedental effect or res judicata, from arising from a judgment which was rendered unreviewable because of mootness. *United States v. Munsingwear, supra; Troy State University v. Dickey, supra, Lebus v. Seafarer's International Union, supra.*

The dangers in this case are even more apparent and immediate. Petitioners, without having the issue of the appropriateness of the judgment below determined, have

been subjected to a possible judgment for attorney's fees in the amount of $11,373.75.

Moreover, other dangers to Petitioners are very real in this case. Without a final appellate determination as to whether the challenged UIL rule was actually unconstitutional, the UIL is faced with a court decision, which cannot be challenged and which in effect holds a UIL rule invalid. The only possible challenge would be to ignore the trial court decision, thus generating another suit wherein the UIL could again argue the merits of the UIL rule in question.

In such a case, a precedential effect of the decision of the lower court will obviously weigh against the UIL and the UIL will be handicapped in asserting a good faith defense to a prayer for damages.

The court below cited numerous cases in an apparent attempt to extinguish these fears. Petitioners submit, however, that these cases are distinguishable from the case at bar.

Plaintiffs in *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979), obtained a preliminary injunction *and* a consent decree against the rule which prohibited the activity of plaintiffs that precipitated the legal proceeding. In the case at bar, Jane Doe obtained a preliminary injunction, but there has been no adjudication either by consent or otherwise that the University Interscholastic League rule is invalid. The UIL rule is still in effect and is being enforced by UIL. Therefore, reliance upon *Iranian Students Association v. Edwards* as authority for awarding attorneys fees in this case is inappropriate. Likewise, in *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979), the challenged statute was declared unconstitutional by the district court and during the pendency of the appeal, the Mississippi legislature amended the statute to eliminate the challenged provision. Here again,

the plaintiff was successful in eliminating the challenged statutory provision. In the case at bar, this has not happened.

All of the "prevailing party" cases cited in the decision of the court below fall into the same category, i.e., the challenged rule or statute was changed so that the offending feature was removed. In that context, the plaintiffs were the "prevailing party." In the same context, Jane Doe in the case at bar is not the "prevailing party" because the UIL rule that was challenged is still intact and being enforced.

In the case now before Court, Petitioners would argue that this Court should consider the court below's position as to mootness and should conform the law of the circuit to the decisions of this court in *University of Texas System, et al. v. Dr. Said A. Assaf, and Board of Regents v. New Left Education Project.*

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

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